IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of		)
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	Steve Klotz et al.	)
		)
Serial No.:	10/661,200	) Art Unit
		) 2113
Filed:	September 12, 2003	)
		)
For:	NETWORK ANALYSIS TOOL	)
		)
Confirmation No.:	7200	)
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Customer No.:	022913	)
		)
Examiner:	Michael C. Maskulinski	)

PRE-APPEAL BRIEF REQUEST FOR REVIEW

Mail Stop **AF**
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

In reply to the Final Office Action mailed 12 December, 2007 (the "Final Office Action"), Applicants respectfully request a panel review of the final rejection under 35 U.S.C. § 103(a) discussed in the remarks below. No amendments are being filed with this Request. This Request is being filed concurrently with a Notice of Appeal.

Reconsideration of the application by a panel of examiners is respectfully requested in view of the following remarks. Please note that the following remarks are not intended to be an exhaustive enumeration of the distinctions between any cited references and the claimed invention. Rather, the distinctions identified and discussed below are presented solely by way of example to illustrate some of the clear errors in the rejection.

REMARKS

In the Final Office Action, the Examiner rejected claims 1-15 and 17-21 under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 5,850,388 to Anderson et al. ("*Anderson*"). Applicants submit, however, that certain legal and factual deficiencies discussed below constitute clear errors and, therefore, withdrawal of the rejection is respectfully requested.

A.   Claim 1

Claim 1 recites a method comprising, among other things: "...determining a network device topology from a first processing of the data trace; [and] building user layer protocols using a second processing of the data trace and the determined device topology..." The Examiner's allegation that *Anderson* discloses the aforementioned limitations is based on a logical impossibility.

The Examiner has repeatedly alleged that "Anderson et al. disclose determining station-level statistics by analyzing source and destination addresses in the packet (determining a network topology from a first processing of the data trace)." *See Office Action*, p. 3 (citing *Anderson* at col. 11, ll. 5-17). Hence, it appears to be the position of the Examiner that the "statistics" of *Anderson* correspond to the claimed "device topology." However, the Examiner has also alleged that these same statistics are computed "using...the determined device topology [i.e., the statistics]." *See id.*, p. 3 (citing *Anderson* at col. 10, ll. 60-65 and col. 11, ll. 1-17) (emphasis added). Thus, the statistics of *Anderson* are alleged to have been computed using themselves. However, such circular computation is logically impossible.

In the Response to Arguments section of the Office Action, the Examiner disagreed with the foregoing analysis by Applicants but did not specifically point out any error or shortcoming in that analysis. Instead, the Examiner changed positions and identified a "station list array" in which the statistics are stored as corresponding to the claimed "device topology." *See Office Action*, p. 10 ("[A]s station-level statistics...are calculated, they are stored in an array called the 'station list array'.... This clearly is a device topology...."). However, this characterization is at odds with other statements in the rejection identifying the statistics themselves as the claimed "device topology." *See, e.g., id.*, p. 3. In any case, the Examiner has not shown that *Anderson* describes computing the statistics stored in the array using the array itself.

The Examiner also responded to the aforementioned remarks by asserting that packet source and destination addresses are purportedly used in *Anderson* to: determine the statistics, identify stations, and correlate the statistics to their respective stations. *See Office Action*, p. 10. This observation, however, is non-responsive to Applicants' arguments raised above. In particular, the Examiner has merely repeated an earlier assertion: "Anderson et al. disclose determining station-level statistics by analyzing source and destination addresses in the packet (determining a network topology from a first processing of the data trace)." *See, e.g., id.*, p. 3. Thus, putting aside the matter of whether or not these remarks are accurate, they are not relevant to the arguments raised by Applicants.

Moreover, the Examiner continued to rely on a column 4 passage of *Anderson*, which describes identification and analysis of "protocol portions" of data packets, as allegedly disclosing "building user layer protocols." *See Office Action*, p. 3 (citing *Anderson* at col. 4, ll. 62 and 63). However, the Examiner did not even assert, much less establish, that *Anderson* discloses "user layer protocols" that are built "using a second processing of the data trace and the determined device topology," as recited in claim 1. Instead, the Examiner asserted that the statistics—described in columns 10 and 11 of *Anderson*—are computed using a second processing and the determined device topology. *See Office Action*, p. 3.

The Response to Arguments section of the Office Action merely added other observations of irrelevant, purported teachings of *Anderson*. For example, the Examiner alleged that "[t]hroughout the patent Anderson et al. discloses protocol analyzing" and that "Anderson et al. disclose building user layer protocols by analyzing the packets and then associating statistics with each station based on the analysis of the addresses (the determined device topology)." *See Office Action*, p. 10 and 11. Notwithstanding, these statements fail to even assert that *Anderson* discloses "user layer protocols" that are built "using a second processing of the data trace and the determined device topology," as recited in claim 1. Thus, even if these statements are accurate, which Applicants do not concede, they are not relevant to what is actually recited in the claim.

B. Claim 10

Claim 10 requires "determining a topology of the data network via analysis of a combination of the plurality of data traces; [and] processing the combination of the plurality of data traces in conjunction with the determined topology to rebuild user layer protocols...." The

Examiner also based the rejection of this claim on illogical reasoning.

In particular, the Examiner alleged a correspondence between determining "statistics" and "determining a topology." In the Response to Arguments section, the Examiner alleged basically the same correspondence, adding that the creation of a list of stations—as well as their statistics—corresponds to determining a topology. *See Office Action*, p. 11. The Examiner also alleged, however, that the <u>statistics</u> are computed by "processing...data traces in conjunction with the <u>determined topology</u> [i.e., the statistics]." *See id.*, p. 6 ("...Anderson et al. disclose computing statistics ...(processing...data traces in conjunction with the determined topology....)"). However, it is illogical to assert, as the Examiner has, that the statistics can be computed by processing data in conjunction with the statistics themselves.

Moreover, the processing step of claim 10 is done "to rebuild user layer protocols." In contrast, this relationship is not even alleged by the Examiner to be taught in *Anderson*. Instead, the Examiner asserted that the processing is done to compute <u>the statistics</u> described in columns 10 and 11 of *Anderson*. *See Office Action*, p. 6. This assertion is repeated in the Response to Arguments section: "By creating protocol-related <u>statistics</u> for each station, Anderson et al. disclose processing the data traces in conjunction with the determined topology." *See id.*, p. 12 (emphasis added). The Examiner also asserted in the response to arguments section that *Anderson* teaches a <u>separate</u> process for rebuilding user layer protocols: "Each protocol layer is taken one by one from [a] frame and thus the layers are rebuilt." *See id.* Thus, putting aside whether or not these statements are accurate, they fail to even state, much less establish, that *Anderson* teaches a relationship between "processing the combination of the plurality of data traces in conjunction with the determined topology," on the one hand, and "rebuild[ing] user layer protocols," on the other, as required by claim 10.

C. Claim 17

With respect to claim 17, the Examiner asserted that "Applicant's arguments fail to comply with 37 CFR 1.111(b) because they amount to a general allegation that the claims define a patentable invention without specifically pointing out how the language of the claims patentably distinguishes them from the references." *See Office Action*, p. 12. In making this allegation, however, the Examiner is improperly attempting to place a burden on the Applicants to establish (such as by making assertions as to the criticality of certain claim elements)

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patentability of the claims. It is well established, however, that <u>the burden is on the Examiner</u> to make a *prima facie* case that the claims are <u>not</u> patentable. The placement of this burden on the Examiner is set forth in the statute governing anticipation: "A person shall be entitled to a patent <u>unless</u>...." 35 U.S.C. § 102 (emphasis added.) As discussed in Applicants' previous response, the Examiner's burden to show anticipation has not been met because the Examiner relied on illogical reasoning as a basis for the claim rejection and failed to establish that each and every element as set forth in claim 17 is found in *Anderson. See Applicants' RCE and 'Submission'* dated October 9, 2007, p. 10.

The Examiner also repeated the rejection and disagreed with Applicants' arguments "at least for the reasons given above [with respect to claims 1 and 10]." *See Office Action*, p. 12. However, inasmuch as those reasons are refuted by the foregoing remarks, Applicants respectfully submit that the rejection of claim 17 is improper.

CONCLUSION

In view of the discussion submitted herein, Applicants respectfully submit that the Examiner's rejection is based on legal and factual deficiencies that constitute clear errors. Therefore, reconsideration of the rejections is requested and allowance of pending claims 1-22 is respectfully solicited. In the event that the Examiner finds any remaining impediment to a prompt allowance of this application that could be clarified in a telephonic interview, the Examiner is respectfully requested to initiate the same with the undersigned attorney.

Dated this 30th day of January, 2008.

Respectfully submitted,

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